IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-793

LOCAL 254, GRAPHIC ARTS INTERNATIONAL UNION, AFL-CIO, CORNELIUS KLOET, JAMES SCHAEFFER, ROBERT BRENNEN, ROBERT ANDERSON, KENNETH A. KUSTERS, ROBERT L. PHILOPULOUS AND JACK L. CHRISTIAN,

Petitioners,

vs.

WESTERN PUBLISHING COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 522 F. 2d 530. The decision and order of the United States District Court for the Eastern District of Wisconsin is reported in 381 F. Supp. 445 ¶ 10,511 (1974). The opinion and the decision and order are reproduced in the Petition for a Writ of Certiorari (A1-A8 and A9-A11, respectively).[1]

1. References designated as "A. ." are to pages in the Appendix to the Petition for a Writ of Certiorari. References designated as "Pet. . ." are to pages in the Petition for a Writ of Certiorari.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition for a Writ of Certiorari.

QUESTION PRESENTED

Whether the court below correctly interpreted the no-strike and mandatory arbitration provisions of the collective bargaining agreement between Respondent and Petitioners to require arbitration prior to effecting a work stoppage.

STATUTE INVOLVED

The pertinent provision of the Labor-Management Relations Act of 1947, 29 U. S. C. § 185(a), is cited and set forth in the Petition at p. 3.

STATEMENT

On May 14, 1973, Respondent, Western Publishing Company, Inc. (hereinafter "Western" or "Company") filed a complaint for injunctive relief and damages against Petitioners and all persons acting in concert and participation with them for engaging in a strike, work stoppage or slowdown at Western's Racine, Wisconsin plant (A1-A2).[2] On the same day, Western also filed a motion for a temporary restraining order, a hearing on which was held on May 17, 1973. The district court denied the motion on the ground that Western had not sufficiently demonstrated that its legal remedies would be inadequate. Thereafter, on August 8, 1973 Western amended its complaint to include a specific prayer for $65,000 in damages.[3]

2. Defendants in the action and petitioners here are Local 254, Graphic Arts International Union (hereinafter "Local 254" or "Union") and certain individuals who were, at the time of filing, officers and members of Local 254 (A1-A2).

3. In its Decision and Order issued on January 9, 1974, the district court dismissed the damage claim against the individual defendants.

The complaint in substance alleged that the work stoppage at Western's Racine facility was in violation of the no-strike and mandatory grievance and arbitration provisions of the collective bargaining agreement between Western and Local 254, effective January 1, 1972 through January 1, 1975 (hereinafter "Agreement"),[4] in that it concerned a dispute which, by the

4. The Agreement's no-strike clause in part reads as follows:

Section 1. There shall be no strikes, stoppages, slowdowns, or general concerted action to interfere with the quality and quantity of production required by the Company and its customers during the term of this contract, except as otherwise provided under this contract.

The Agreement's mandatory grievance and arbitration procedure in part reads as follows:

ARTICLE 24. GRIEVANCE PROCEDURE—ARBITRATION

Section 1. In the event an individual has a question or grievance, he first will go to his foreman or supervisor in order to get an answer or a satisfactory understanding.

Section 2. If the individual is unable to get the information or fails to reach an amicable conclusion, he may get in touch with the Union representatives and together they will discuss the question or grievance with the foreman or supervisor in an effort to reach an understanding that is satisfactory to all parties.

Section 3. If no understanding is reached with the supervisor or the foreman, then the employee and the Union representative may bring the matter to the attention of the area superintendent. This action must be initiated within five working days.

Section 4. If the employee is not satisfied with the decision of the area superintendent, then the employee and the Union representative shall reduce the matter to writing, which shall be signed by the employee, the supervisor or foreman and the area superintendent, whereupon it shall be submitted to the plant superintendent. This action must be initiated within five working days.

Section 5. If the differences cannot be settled, the matter shall be submitted to a joint committee or arbitration within five days. The Joint Arbitration Committee shall consist of three representatives of the Union and three representatives of the Company. In case of a vacancy, absence or refusal of a representative to act, another shall be appointed to fill such vacancy. Such committee shall meet immediately at the end of the five-day period for the purpose of settling the dispute and the decision of the committee shall be binding upon both parties.

(Footnote continued on next page.)

terms of the Agreement, must be resolved in accordance with the Agreement's mandatory grievance and arbitration procedures.

On May 7, 1974, Western filed a motion for a summary judgment on the issue of liability. On August 7, 1974, the district court denied Western's motion, granted summary judgment in favor of defendants, and dismissed the complaint (All).

On September 4, 1975, the court of appeals reversed the district court's judgment and remanded the cause for further proceedings (A8).

I. The Facts

During April 1973, Western began permanently closing down its printing and bindery operations (including lithographic work) at its Hanibal, Missouri facility. It was, therefore, required to allocate to other of its plants work which the Hanibal plant had previously executed (A2). As part of this general reallocation, the lithographic work on "Easyriders", a bi-monthly publication, was assigned to Western's Racine plant and was scheduled to commence on May 8, 1973 (*Id.*).

Between May 8 and May 14, 1973, Western delayed production of the "Easyriders" lithographic work in order to engage in a series of discussions with Local 254 with respect to the assignment of this work to members of the Racine bargaining unit (A3). Western maintained that the work was not struck work within the meaning of Article 18 of this Agreement;[5]

Section 6. Should the joint committee be unable to agree within ten days, then it will refer the matter to the American Arbitration Association for arbitration under their normal procedures, provided such dispute involves interpretation of this Agreement or the failure of the parties to reach an agreement relative to any grievance coming within the provisions thereof, except wages. The decision of the arbitrator shall be final and binding on both parties, provided that local union laws not affecting wages, hours, or working conditions and the laws of the International shall not be subject to arbitration.

5. Article 18 of the Agreement reads as follows:

ARTICLE 18. STRUCK WORK

The Company agrees that it will not render production assistance to any employer, any of whose plants is struck by any local of the Lithographers and Photoengravers International Union or by the International, or where members of any such local or the International are locked out, by requiring the employees covered by this contract to handle any struck work farmed out directly or indirectly by such employer, other than work which the Company herein customarily has performed for the employer involved in such strike or lockout. The Union through its officers will inform or advise the Company and its membership as to struck work.

however, it suggested that if there were a question as to the application of the struck work provision, proper resolution of the matter would be to arbitrate the issue pursuant to the Agreement's grievance and arbitration procedures (A3-A4). Western, furthermore, offered to expedite the arbitration process (A4).

During this six day period, Local 254 waivered with respect to its position on whether the "Easyriders". work was indeed struck work. Thus, unable to resolve the matter with the Union, Western proceeded on May 14 to assign the work to its Racine employees (*Id.*).[6] Members of Local 254, after consultation with the Union, refused to work on the assignment (*Id.*). One member who had begun work on the project stopped such work after being informed by a Union representative that "Easyriders" was struck work (*Id.*).

Western again met with Local 254 to reiterate that "Easyriders" was not struck work, that any question as to its nature should be resolved through the Agreement's grievance and arbitration procedures, and that such arbitration could be expedited (*Id.*). Because the Union refused either to forego its work stoppage or to arbitrate the issue with respect to the "Easyriders" work, Western filed this action (*Id.*).

II. The District Court Proceedings

At the May 17, 1973 hearing on the motion for a temporary restraining order, the district court stated that it ". . . believe[d] that this is an arbitrable issue", that it was " . . . inclined to

6. Because of the "Easyriders" on-sale date schedule, Western was unable to further delay execution of the work.

believe that it is probable that this is not 'struck work' ", and that it was ". . . inclined to believe that Boys Market governs the situation." Nevertheless, the court denied the motion on ". . . general principles of equity."

In its August 7, 1974 Decision and Order, the district court denied Western's motion for summary judgment on the issue of liability. It concluded that the struck work issue was not yet ripe for arbitration; that Western could "trigger" the grievance and arbitration procedure by disciplining any Union member who refused to perform the "Easyriders" work; and, that it ". . . would be inappropriate for [the] court to compel parties to engage in a dispute settlement procedure that the plaintiff could itself trigger" (A10). The district court thus held as follows (A11):

> In the event that Western disciplines a member for his refusal to perform the claimed "struck work", such employee could file a grievance pursuant to Article 24. The issue whether the challenged assignment is "struck work" would then be ripe for resolution pursuant to the procedure outlined therein.

III. The Opinion of the Court of Appeals

The court of appeals reversed the judgment of the district court and remanded the cause for further proceedings (A8). In its opinion, the court of appeals first noted that the parties were in accord that the Agreement's struck work provisions constituted an exception to its no-strike clause and "that what constitutes struck work is an arbitrable issue" (A4). The court then held as follows (A5):

> We do not think that the Union can exercise its right to refuse to perform struck work until the dispute over the character of the work is first resolved. Since the issue of what constitutes struck work is admittedly arbitrable, the policy of the law favoring arbitration and the peaceful resolution of labor disputes (citations omitted) would not be fostered if the contract were interpreted so that the Union could direct economic force at an arbitrable issue.

The court of appeals, therefore, concluded that the Union had breached the no-strike clause of the Agreement (A7). However, it further noted that Western will have suffered damages only if it is ascertained that "Easyriders" was not struck work and, thus, a job which the members of the Union were obligated to execute (A8).

ARGUMENT

I. The Decision of The Court Below Does Not Present a Question of Substantial Importance Appropriate for Review by This Court.

None of the reasons presented by petitioners demonstrates that this matter warrants review by the Court. In substance petitioners merely argue that review is appropriate because petitioners believe the decision of the court below to be wrong.

However, the petition clearly manifests that this is a matter of highly limited significance for persons other than the parties involved. First, crucial to the decision of the court below is the specific language of the particular collective bargaining agreement before it. Indeed, the thrust of petitioners' argument is that the court below is wrong because it misconstrued the relevant contract clauses. Second, any right not to perform struck work can only be the product of a particular collective bargaining agreement according such right. There is no underlying statutory right not to perform struck work. Therefore, the parameters of any struck work obligation or right are unique to a particular collective bargaining agreement. Thus, were the court below presented with the same issue as here but with another collective bargaining agreement containing different no-strike, struck-work, and grievance-arbitration provisions, it could, in all likelihood, reach an opposite conclusion.

This case, therefore, presents no question of significance warranting consideration by this Court. Accordingly, the Petition for a Writ of Certiorari should be denied.

II. The Decision of The Court Below Is Not in Conflict With Other Decisions and Is, Thus, Not Appropriate for Review by This Court.

Petitioners argue that the decision of the court below is in conflict with this Court's decision in *Gateway Coal Company* v. *United Mine Workers,* 414 U. S. 368 (1974) and, insofar as the court below relied on decisions of the third and fourth circuits, its decision is in conflict with decisions of the second and fifth circuits. However, examination of the cited cases demonstrates that the decision below does not conflict with either this or other courts' decisions.

A. The Gateway Coal Case

Petitioners' attempt to create a conflict with the Court's decision in *Gateway Coal* is unpersuasive. Like Western, Gateway Coal Company was "[f]aced with a continuing strike and a refusal to arbitrate . . . (414 U. S. at 372). In upholding the district court's injunction, the Court made three determinations.[7] First, the Court held that the dispute was arbitrable under the contract's broad grievance-arbitration provision (414 U. S. at 376). In so holding, the Court took particular note of "[t]he federal policy favoring arbitration of labor disputes . . ." (414 U. S. at 377). Second, the Court held that the grievance-

7. According to the Court, the Gateway case presented three questions (414 U. S. at 374):

> First, did the collective-bargaining agreement then in force between these parties impose on them a compulsory duty to submit safety disputes to arbitration by an impartial umpire? Second, if so, did that duty to arbitrate give rise to an implied no-strike obligation supporting issuance of a Boys Markets injunction? Third, did the circumstances of this case satisfy the traditional equitable considerations controlling the availability of injunctive relief?

arbitration provision gave rise to an implied duty not to strike (414 U. S. at 381-82; 386-87). Finally, the Court concluded that all the traditional prerequisites for issuance of an injunction were present (414 U. S. at 387).

In contriving a conflict with the *Gateway Coal* decision, petitioners cite one part of the Court's opinion out of context. However, the cited language arises in the context of the Court's discussion of implied no-strike obligations (414 U. S. at 382), an issue not present in this case. In short, the reference to *Gateway Coal* has no true bearing on the matter here in issue.

The thrust of petitioners' argument is that *Gateway Coal* permits parties to a collective bargaining agreement to create clear and express exceptions to whatever no-strike obligation their agreement may impose. Petitioners, thus, argue: (1) that the parties here have created such an exception ". . . as permitted under *Gateway Coal*" (Pet. 10); (2) that the court below "itself recognized" that Article 18 ("Struck Work") of the Agreement constituted such an exception (*Id.*); but (3) that in requiring petitioners to demonstrate through arbitration that they are entitled to the protection of his exception, the court below "render[ed] nugatory" such exception (*Id.*). From this purported syllogism, petitioners conclude that there is a conflict with *Gateway Coal.* This is simply not the case. Neither respondent nor the court below deny that the refusal to perform *valid* struck work is an exception to the Agreement's no-strike clause. Since this is all that petitioners cite *Gateway Coal* for, there is clearly no conflict with that case.

What petitioners, therefore, fail to perceive is that a contract right is not destroyed merely because one is required to demonstrate, through mutually agreed upon arbitration procedures, applicability of that right to a particular situation. Moreover, unless applicability of the contract right is established, a serious risk exists that the rights of the contract's other party will be negated.

B. The Picketing Cases

Petitioners' attempt to create a conflict with decisions of other circuits is similarly unpersuasive. First, petitioners do not state that the decision below is in conflict with decisions of other circuits. Rather, they state that the court below relied, in part, on certain decisions of the third and fourth circuits. It is these third and fourth circuit decisions which petitioners claim conflict with decisions of other circuits (Pet. 13). Second, petitioners completely ignore footnote 6 of the decision below which expressly limits the reliance of the court below upon the decisions of the third and fourth circuits (A6 n. 6). Finally, petitioners obfuscate the crucial distinction between the decision below and the purportedly conflicting decisions of the second and fifth circuits. This case concerns the contract right not to perform struck work. This right is purely contractual in nature, there being no underlying statutory right. By contrast, all the other decisions referred to from the second, fifth, third and fourth circuits are cases involving the right not to cross a stranger picket line, a right which may, in a given situation, have underlying statutory protection. See, e.g., *Gary-Hobart Water Corp.* v. *N. L. R. B.*, 511 F. 2d 284 (7th Cir.), *cert. denied*, 44 U. S. L. W. 3260 (1975). More importantly, all the picketing cases concerned the issue of whether the conduct involved was arbitrable at all. By contrast, the activity here in question was "*admittedly* arbitrable" (A5; emphasis supplied).

Thus, the distinction between this struck work case and the other picketing cases is of crucial importance and negates any purported conflict between the two distinct categories of cases. The court below clearly recognized this crucial distinction (A6 n. 6). Petitioners, however, have failed to do so (Pet. 13-16).

III. The Decision of The Court Below Is Correct on the Merits.

The decision of the court below is correct on the merits because: (1) Local 254's work stoppage was a strike in violation of the Agreement's no-strike provision; (2) the issue of the applicability of the Agreement's struck work provision to the "Easyriders" assignment was arbitrable; and (3) Local 254 is responsible for breach of the Agreement's no-strike provision.

First, Local 254's refusal to allow its members to perform the assigned "Easyriders" work clearly ". . . interfere[d] with the quality and quantity of production required by the Company and its customers . . ." in contravention of the Agreement's no-strike clause (see *supra* p. 3), thereby constituting an enjoinable strike, stoppage, slowdown and concerted action. Moreover, courts have repeatedly held that a work stoppage will violate a no-strike provision even where such stoppage is only a partial cessation of work. See, *e.g.*, *Elevator Manufacturer's Association of New York* v. *International Union of Elevator Constructors, Local 1*, 342 F. Supp. 372, 374 (S. D. N. Y. 1972); *Avco Corporation* v. *Local Union No. 787 of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 459 F. 2d 968 (3d Cir. 1972); *Geo. A. Hormel & Co.* v. *Local Union No. P-31, Amalgamated Meat Cutter and Butcher Workmen*, 349 F. Supp. 785 (N. D. Ia. 1972).

Second, the question of whether the Agreement's struck work clause was applicable to these circumstances was subject to the Agreement's mandatory grievance and arbitration provision. Local 254 did not deny that the refusal to execute the "Easyriders" assignment was a work stoppage; rather, it claimed that such stoppage was justified by the Agreement's struck work provision. Western, while consistently maintaining that the struck work provision was inapplicable to these facts, nevertheless, asserted that the only proper vehicle for resolution of the dispute is the Agreement's grievance and arbitration procedure, the purpose of which is to resolve a ". . . dispute involv[ing] interpretation of this Agreement . . ." (Article 24, Section 6, *supra* p. 4). Because this dispute clearly concerns

the interpretation of the Agreement's struck work provision, it falls within the scope of the Agreement's arbitration procedure. Indeed, Local 254 in its answer expressly admitted that this dispute was arbitrable (A4, 5). However, it further maintained that it had an option either to pursue the grievance and arbitration procedure or to take some other action, including, apparently, strike action.

As the court below correctly noted, such an option, as the Union asserts exists for it alone, would effectively immasculate the Agreement's arbitration procedure as a vehicle for the peaceful settling of contract disagreements and, in so doing, would retard the federal policy favoring arbitration of labor disputes (A5):

> We do not think that the Union can exercise its right to refuse to perform struck work until the dispute over the character of the work is first resolved. Since the issue of what constitutes struck work is admittedly arbitrable, the policy of the law favoring arbitration and the peaceful resolution of labor disputes, see *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 386 (1974); *Local 81, American Federation of Technical Engineers* v. *Western Electric Co.*, 508 F.2d 106, 108 (7th Cir. 1974), would not be fostered if the contract were interpreted so that the Union could direct economic force at an arbitrable issue. Although according to the Union's position arbitration would later occur, if the work was determined not to be struck work, then an unnecessary resort to force has occurred.

Unquestionably, a delicate balance must be struck between the Union's right to refuse to perform struck work and the Company's right not to have production interrupted unnecessarily. The parties to the Agreement provided for his balance to be effectuated through a grievance-arbitration mechanism. Nevertheless, Local 254 contends that to require arbitration of the question of whether a particular work assignment is struck

work would "destroy" the purpose of Article 20 (Pet. Br. 11).[8] Clearly, such a contention lacks merit. Moreover, as the court below correctly noted, arbitration of such a dispute could be expedited (A7).[9] Practically, no significant amount of work could be performed during such expedited arbitration proceedings, thereby guaranteeing that the rights of individual members under Article 20 would have a very real impact should it be determined that a particular assignment was, in fact, struck work.[10]

Finally, the court below properly concluded that Local 254 was responsible for the work stoppage by its members at Western's Racine facility (A4 n. 4, A7). It has been repeatedly held that a union is responsible for the concerted action of its members. See, *e.g.*, *United Textile Workers* v. *Newberry Mills, Inc.*, 238 F. Supp. 366, 373 (W. D. S. C. 1965); *Portland Web Pressman's Union* v. *Oregonian Publishing Co.*, 188 F. Supp. 859, 866 (D. Ore. 1960), *aff'd.*, 286 F. 2d 4 (9th Cir. 1960), *cert. denied*, 366 U. S. 912 (1961); *United States* v. *Brotherhood of Railroad Trainmen*, 96 F. Supp. 428 (N. D. Ill. 1951). More importantly, however, the court below concluded that Local 254 had authorized the work stoppage by its members and was, therefore, legally responsible (A4 n. 4):

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8. Article 20 of the Agreement reads as follows:

ARTICLE 20. INDIVIDUAL RIGHT TO EMPLOYEE.

The Company agrees that it will not discharge, discipline or discriminate against any employee because such employee refuses to handle any work of the type described in the Struck Work clause.

9. The court below emphasized that Western had repeatedly "offered to expedite the arbitration process" (A4).

10. Indeed, Western delayed execution of the "Easyriders" assignment for six days while discussing the matter with the Union in the hope of either resolving the issue or convincing the Union to go to expedited arbitration (A3). Furthermore, should it be determined through arbitration that the Company had improperly assigned struck work, the Union would, as to completed work (if any) have other legal remedies against the Company for such a breach of Article 18 ("Struck Work").

> The Union argues that it is not responsible for the work stoppage because although its members admittedly consulted with it concerning the Easyriders job, it did not instruct any member not to perform the work. Each member, it contends, individually elected not to work on Easyriders. Suffice it to say that we need not blindfold ourselves to reality, and that the 'consultations' here establish the responsibility of the Union.

Accordingly, the decision of the court below is consisent with decisions of this and other courts and is unquestionably sound. Review, therefore, of such decision by this Court would be inappropriate.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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